

*Designated for electronic publication only*

**UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS**

No. 15-3367

KIM M. FILARSKY, APPELLANT,

v.

ROBERT A. McDONALD,  
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before LANCE, *Judge*.

**MEMORANDUM DECISION**

*Note: Pursuant to U.S. Vet. App. R. 30(a),  
this action may not be cited as precedent.*

LANCE, *Judge*: The appellant, Kim M. Filarsky, served in the U.S. Navy from November 1989 to December 1993, including service in the Gulf War. Record (R.) at 98. She appeals, through counsel, a July 28, 2015, Board of Veterans' Appeals (Board) decision that, in part, denied entitlement to an initial disability rating greater than 10% for cervical spine disc herniation prior to June 4, 2014.<sup>1</sup> R. at 1-19. Single-judge disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). This appeal is timely, and the Court has jurisdiction over the case pursuant to 38 U.S.C. §§ 7252(a) and 7266. For the reasons that follow, the Court will affirm the July 28, 2015, decision.

**A. Scheduler Analysis**

For the pertinent period on appeal, the appellant's cervical spine disorder is rated pursuant to 38 C.F.R. § 4.71a, diagnostic code (DC) 5237. R. at 353. In addition to the rating criteria, disability ratings of the musculoskeletal system contemplate functional loss due to pain and weakness that causes additional disability beyond that reflected in clinical range of motion

---

<sup>1</sup> The Court lacks jurisdiction over the issues of entitlement to a separate rating for neurological abnormalities, to include radiculopathy of the left upper extremity, associated with the appellant's cervical disc herniation, and entitlement to a total disability rating based upon individual unemployability (TDIU) that were remanded, and they will not be addressed further. *See* 38 U.S.C. §§ 7252(a), 7266(a); *Howard v. Gober*, 220 F.3d 1341, 1344 (Fed. Cir. 2000).

measurements. *See Mitchell v. Shinseki*, 25 Vet.App. 32, 43 (2011); *DeLuca v. Brown*, 8 Vet.App. 202, 206-07 (1995) (holding that, when a disability rating is based on limitation of motion, the Board must consider additional functional loss due to pain, such as weakness, lack of endurance, and fatigability on use or during flare-ups pursuant to 38 C.F.R. §§ 4.40 and 4.45); 38 C.F.R. §§ 4.40 (2016), 4.45 (2016).

The Board "considered functional loss due to flare-ups of pain, fatigability, incoordination, pain on movement, and weakness." R. at 12. The Board found that "an increased evaluation for the [appellant]'s service-connected cervical spine disorder is not warranted on the basis of functional loss due to pain" and that her "symptoms are contemplated by the 10[%] rating already assigned." R. at 13. In doing so, the Board acknowledged that a "June 2008 VA examiner found extension, right lateral rotation, and left lateral rotation of the [appellant]'s neck produced pain" but that she "maintained forward flexion of the cervical spine to 45 degrees and there was no additional loss [of] motion following repetitive use testing." *Id.* The Board also acknowledged that "an October 2010 private treatment record notes cervical spine flexion and rotation within full limits" but also an "increase in pain with cervical spin rotation and extension when performed." *Id.*

The appellant argues that the Board should have discussed the record evidence documenting "episodic numbness and tingling in the right hand, generalized weakness in the right upper extremity, and difficulty with prolonged grip or with opening jars." Appellant's Brief (Br). at 13. However, as the Secretary explains, the appellant is separately service-connected for radiculopathy of the right upper extremity associated with her service connected cervical spine disorder pursuant to 38 C.F.R. § 4.124a, DC 8511. R. at 353; Secretary's Br. at 13. The Court agrees that the appellant fails to explain why the Board was required to discuss the cited record evidence in the context of her service-connected cervical spine disability or "how assigning a rating for these symptoms under multiple diagnostic codes would not violate the general prohibition against pyramiding." *Id.*; *see Locklear v. Nicholson*, 20 Vet.App. 410, 416 (2006) (holding that the Court will not entertain underdeveloped arguments); *Coker v. Nicholson*, 19 Vet.App. 439, 442 (2006) ("The Court requires that an appellant plead with some particularity the allegation of error so that the Court is able to review and assess the validity of the appellant's arguments."), *rev'd on other grounds sub nom. Coker v. Peake*, 310 F. App'x 371 (Fed. Cir. 2008) (per curiam order); *Hilkert v.*

*West*, 12 Vet.App. 145, 151 (1999) (en banc) ("An appellant bears the burden of persuasion on appeals to this Court."), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000) (table).

With respect to the appellant's argument that the Board failed to discuss her "constant posterior neck pain" and "pain with activity and prolonged sitting," Appellant's Br. at 13, pain is contemplated by the General Rating Formula for Diseases and Injuries of the Spine and corresponding regulations. *See* 38 C.F.R. § 4.71a (2016), DCs 5235-5246 ("For diagnostic codes 5235 to 5243 . . . [w]ith or without symptoms such as pain (wh[e]ther or not it radiates), stiffness, or aching in the area of the spine affected by residuals of injury or disease."); *see also Mitchell*, 25 Vet.App. at 32; 38 C.F.R. §§ 4.40, 4.45, 4.59 (2016). Similarly, although she faults the Board for failing to discuss her "problems with lifting and carrying," Appellant's Br. at 13, her inability to lift and carry constitutes functional limitations that are contemplated by the governing diagnostic code criteria and corresponding regulations, *see* R. at 6-15; DC 5237; *Mitchell*, 25 Vet.App. at 32; *DeLuca*, 8 Vet.App. at 205-06; 38 C.F.R. §§ 4.40, 4.45, 4.59.

The appellant also contends that the Board should have considered her symptoms of "difficulty with sleep and at work with computer use," "decreased manual dexterity," and "weakness or fatigue." Appellant's Br. at 13. However, other than enumerating those symptoms, she fails to explain how consideration of them would potentially lead to a different result under the DCs. *See Locklear*, 20 Vet.App. at 416; *Coker*, 19 Vet.App. at 442; *Hilkert*, 12 Vet.App. at 151. After a review of the Board's discussion of the applicable regulations and the lay and medical evidence of record, the Court holds that the Board properly considered the application of §§ 4.40 and 4.45 in its decision and provided an adequate statement of the reasons or bases for its findings. *See Mitchell* and *DeLuca*, both *supra*; *see also* 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995).

#### B. Extraschedular Analysis

An extraschedular rating is appropriate where the case presents an exceptional or unusual disability picture with such related factors as frequent periods of hospitalizations or marked interference with employment. 38 C.F.R. § 3.321(b) (2016). "The determination of whether a claimant is entitled to an extraschedular rating . . . is a three-step inquiry." *Thun v. Peake*, 22 Vet.App. 111, 115 (2008), *aff'd sub nom. Thun v. Shinseki*, 572 F.3d 1366 (Fed. Cir. 2009); *see Anderson v. Shinseki*, 22 Vet.App. 423, 427 (2009) (clarifying that, although the Court in *Thun*

identified three "steps," they are, in fact, necessary "elements" of an extraschedular rating). The first step in the inquiry is to determine whether "the evidence before VA presents such an exceptional disability picture that the available schedular evaluations for that service-connected disability are inadequate." *Thun*, 22 Vet.App. at 115; see *Sowers v. McDonald*, 27 Vet.App.472, 478 (2016) ("The rating schedule must be deemed inadequate before extraschedular consideration is warranted."). "Therefore, initially, there must be a comparison between the level of severity and symptomatology of the claimant's service-connected disability with the established criteria found in the rating schedule for that disability." *Thun*, 22 Vet.App. at 115. If the adjudicator determines that the available schedular ratings are inadequate, the second step of the inquiry requires the adjudicator to "determine whether the claimant's exceptional disability picture exhibits other related factors," such as marked interference with employment or frequent periods of hospitalization. *Id.* at 116. Then, if the first two steps have been satisfied, the adjudicator must refer the claim to the Under Secretary for Benefits or the Director of the Compensation Service for a determination of whether an extraschedular rating is warranted. *Id.*

In *Yancy v. McDonald*, the Court explained that "the first *Thun* element compares a claimant's symptoms to the rating criteria, while the second addresses the resulting effects of those symptoms." 27 Vet.App. 484, 494 (2016). Indeed, although the first and second *Thun* elements are interrelated, they "involve separate and distinct analyses" and, "[i]f either element is not met, then referral for extraschedular consideration is not appropriate." *Id.*

With respect to the issue of entitlement to referral for extraschedular consideration for the appellant's service-connected cervical spine disorder, the Board found "that the symptomatology and impairments caused by [her] service[-]connected disabilities are specifically contemplated by the schedular rating criteria." R. at 14-15. The Board determined that "[a]s was explained in the merits decision . . . , the criteria for a higher schedular rating was considered, but the rating assigned was upheld because the rating criteria are adequate." R. at 15. The Board explained that the appellant's "cervical spine is manifested by pain" and that "[t]he rating criteria specifically contemplate such symptomatology." *Id.*

On appeal, the appellant faults the Board for failing to discuss how DC 5237 contemplates her "multitude of symptoms aside from pain," including her "poor posture and significant bilateral rounded shoulders." Appellant's Br. at 14-16. Her contentions, however, ultimately amount to

nothing more than a disagreement as to how the Board weighed the evidence of record, and the Court discerns no error in this regard. *See Madden v. Gober*, 125 F.3d 1477, 1481 (Fed. Cir. 1997) (it is the "duty [of] the Board to analyze the credibility and probative value of evidence"); *Owens v. Brown*, 7 Vet.App. 429, 433 (1995) (it is the province of the Board to weigh and assess the evidence of record).

Turning to the appellant's argument that the Board erred by failing to consider whether referral was warranted for all of her service-connected disabilities on a collective basis, Appellant's Br. at 17-18, "the Board is required to address whether referral for extraschedular consideration is warranted for a veteran's disabilities on a collective basis only when that issue is argued by the claimant or reasonably raised by the record through evidence of the collective impact of the claimant's service-connected disabilities," *Yancy*, 27 Vet.App. at 495; *see Robinson v. Peake*, 21 Vet.App. 545, 552 (2008) (holding that the Board must address issues raised by the appellant or reasonably raised by the record), *aff'd sub nom. Robinson v. Shinseki*, 55 F.3d 1355 (Fed. Cir. 2009). The Board found "that the rating schedule is adequate, even in regard to the collective and combined effect of all of [her] service[-]connected disabilities." R. at 15. Although the appellant argues that "due to the 'weakness and pain' in her arm and neck[,] she cannot lift patients anymore or sit at a computer to chart nursing notes," Appellant's Br. at 17 (citing R. at 93), she provides no explanation for how her service-connected arm and neck disabilities *collectively impact* her disability picture in a way not contemplated by her schedular ratings. *See Yancy*, 27 Vet.App. at 495-96; *see also Locklear*, 20 Vet.App. at 416; *Coker*, 19 Vet.App. at 442. Accordingly, the Court holds that the appellant has failed to carry her burden of demonstrating error. *See Hilkert*, 12 Vet.App. at 151.

Finally, the appellant contends that the Board prematurely adjudicated the question of whether referral for extraschedular consideration was warranted with respect to her cervical spine disorder, in light of the Board's remand of the issue of entitlement to TDIU for additional evidentiary development regarding her employability. Appellant's Br. at 18. In *Brambley v. Peake*, the Court held that "it was premature for the Board to decline extraschedular consideration where the record was significantly incomplete in a number of relevant areas probative of the issue of employability." 17 Vet.App. 20, 23-24 (2003). Five years after *Brambley*, however, the Court set out the three-step process in *Thun* for determining when referral for an extraschedular rating was warranted.

22 Vet.App. at 114. In the decision on appeal, the Board specifically cited *Thun* in its discussion of the appellant's symptoms and the applicable rating criteria and found that her complaints are contemplated by the applicable rating criteria. R. at 15. Once it determined that the first element of the *Thun* inquiry had not been satisfied, the Board had no duty to further consider whether referral was warranted for the appellant's cervical spine disorder based on marked interference with employability, and the Court cannot conclude that the Board erred in this regard. *See Yancy*, 27 Vet.App. at 494.

After consideration of the appellant's and the Secretary's briefs, and a review of the record, the Board's July 28, 2015, decision is AFFIRMED.

DATED: November 30, 3016

Copies to:

Robert V. Chisholm, Esq.

VA General Counsel (027)